Nos. 93-1456 and 93-1828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., ET AL.,

Petitioners,

v.

RAY THORNTON, ET AL.

STATE OF ARKANSAS EX REL. WINSTON BRYANT,
ATTORNEY GENERAL OF THE STATE OF ARKANSAS,

Petitioner,

v.

BOBBIE E. HILL, ET AL.

On Writ Of Certiorari
To The Supreme Court Of Arkansas

BRIEF FOR RESPONDENTS REPRESENTATIVE JAY DICKEY AND REPRESENTATIVE TIM HUTCHINSON SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a State may decline to print on its election ballots the names of multi-term incumbents in the House of Representatives and Senate who are candidates for reelection.

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Pursuant to Rules 12.4 and 24.2 of the Rules of this Court, respondents Jay Dickey, United States Representative for the 4th Arkansas Congressional District, and Tim Hutchinson, United States Representative for the 3rd Arkansas Congressional District, respectfully submit this brief in support of petitioners. Respondents adopt by reference those portions of the brief of the State of Arkansas, peti-

tioner in No. 93-1828, that contain the matters required by this Court's Rule 24.1(b), (d), (e), (f), and (g).

SUMMARY OF ARGUMENT

I. The Supreme Court of Arkansas erred in invalidating Amendment 73 as inconsistent with the Qualifications Clauses and *Powell v. McCormack*, 395 U.S. 486 (1969). *Powell* held only that a single House of Congress lacks authority to impose additional qualifications pursuant to its power to judge the qualifications of its members. The *Powell* Court did not decide the separate question whether the people of a State may impose additional qualifications for congressional office in the exercise of their retained powers. That question is not presented in this case either, because Amendment 73 does not impose any additional qualifications for membership in Congress.

A. As construed by the Supreme Court of Arkansas, Amendment 73 merely prevents multi-term congressional incumbents from having their names printed on the election ballots for their congressional offices. Those individuals can still run for reelection as write-in candidates and, if elected by the voters, can still take office in Congress. As a result, it is clear that Amendment 73 does not impose an additional qualification for congressional office.

B. "Qualifications" for office are those attributes that are legal prerequisites to eligibility for office. Mere ballot-access restrictions like Amendment 73, therefore, are not qualifications. This Court so held in *Storer v. Brown*, 415 U.S. 724 (1974), which expressly rejected the claim that a state law barring a certain category of candidates from the ballot constituted an additional qualification for congressional office. The *Storer* Court reasoned that the challenged law did not impose an additional qualification because even candidates subject to its provisions would not be disqualified from membership in Congress if they were elected by the voters. The same is true of Amendment 73, and thus it cannot be found to impose an additional qualification.

Even if *Storer* did not resolve the matter, the judgment below could not withstand scrutiny. The text of the Constitution itself demonstrates that mere ballot-access provisions like Amendment 73 do not create qualifications for office. The Qualifications Clauses speak exclusively in terms of legal disabilities to membership, and do not include provisions that merely make it more difficult for some candidates to win elections. Moreover, the Constitution grants to each House of Congress the power to "Judge . . . the . . . Qualifications of its own Members," U.S. Const., art. I, § 5, cl. 1, but Amendment 73 creates no "[q]ualifications" for the House or Senate to "[j]udge," because it does not purport to bar any candidate who wins election from taking office.

This textual evidence of the meaning of "[q]ualifications" is also supported by the writings of the Framers of the Constitution and their contemporaries. Dictionaries of the era defined "qualification" as "[t]hat which makes any person or thing fit for any thing," 2 S. Johnson, *A Dictionary of the English Language* 1567 (4th ed. 1773), a definition that necessarily excludes Amendment 73, which does not render anyone "[un]fit" for office.

Similarly, James Madison and Alexander Hamilton characterized qualifications for office as those laws specifying the persons "capable of being elected" or "who may . . . be chosen." 2 *The Records of the Federal Convention of 1787* 250 (M. Farrand ed. 1911); *The Federalist* No. 60, at 408-09 (A. Hamilton) (J. Cooke ed. 1961). Amendment 73, of course, does not render anyone legally incapable of "being elected" or "chosen."

Moreover, it is clear that the Founders did not understand "[q]ualifications" to include laws that merely make it more difficult (or even impossible) as a practical matter for certain individuals to win elections. To the contrary, Madison argued for congressional power to override state laws regulating congressional elections precisely *because* he knew that, absent such power in Congress, state legislatures would

possess unrestrained authority to pass laws aiding their preferred candidates at the expense of others. Likewise, in responding to the argument that Congress would have authority to pass laws effectively dictating which candidates would win congressional elections, Hamilton did not suggest that such laws would constitute additional qualifications for office, even though they would as a practical matter exclude some candidates from Congress. Instead, he made that suggestion only with respect to property qualifications, provisions that would impose legal prerequisites to eligibility for membership in Congress.

In addition, this Court has consistently used the term "[q]ualifications" to mean mandatory prerequisites to eligibility for membership. The lower state and federal courts have followed the same approach. Thus, the text, history, and judicial construction of the Qualifications Clauses make clear that mere ballot-access regulations like Amendment 73 do not impose additional qualifications for congressional office.

C. The contrary interpretation adopted by the Supreme Court of Arkansas should be rejected, because it provides no judicially manageable standards for determining the validity of election laws and improperly intrudes on the authority of Congress. The majority opinions below would apparently invalidate any election laws that leave only "glimmers of opportunity" for particular candidates or place some candidates "at a distinct disadvantage," but courts are ill-equipped to judge the validity of laws based on such a vague and content-less standard.

Indeed, a straightforward application of that standard would necessarily result in the invalidation of numerous state and federal ballot-access provisions, resign-to-run laws, and regulations of the political activities of government employees and others, because all of those laws place more or less severe burdens on the ability of particular classes of individuals to obtain congressional office. Moreover, that stan-

dard would require invalidation of the numerous laws that provide political benefits for multi-term congressional incumbents, because those laws create overwhelming political advantages for multi-term incumbents and corresponding disadvantages for challengers.

Courts ought not inject themselves so deeply into the regulation of congressional elections. Legislative control over the electoral process is necessary to avoid chaos. Moreover, the Constitution gives to Congress, not the courts, the ultimate authority to override unwise state election laws. Accordingly, this Court should reject the analysis of the court below and hold that Amendment 73 does not impose an additional qualification for congressional office.

II. Amendment 73 does not violate the First or Fourteenth Amendments. In reviewing the constitutionality of laws that tend to limit the field of candidates from which voters might choose, this Court applies a flexible standard that weighs the character and magnitude of the burdens imposed by the challenged law against the interests supporting the law and the extent to which the law furthers those interests. Laws like Amendment 73 that impose only reasonable, nondiscriminatory burdens on First and Fourteenth Amendment rights will generally be upheld.

A. In determining whether a challenged election law should be subjected to strict judicial scrutiny, the Court has focused primarily on the extent to which the law discriminates against politically disadvantaged groups such as minor parties, independent candidates, or the indigent. Where a challenged law does unfairly burden such groups, the Court has consistently invalidated it. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Williams v. Rhodes*, 393 U.S. 23 (1968). On the other hand, the Court has repeatedly upheld regulations of the election process that do not discriminate against politically disadvantaged groups or otherwise attempt to maintain the status quo. *See, e.g., Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971).

Amendment 73 does not discriminate against any politically disadvantaged groups or serve to maintain the status quo. Instead, it burdens only the political opportunity of multi-term incumbents, a uniquely privileged class. As this Court's decision in *Clements v. Fashing*, 457 U.S. 957 (1982), makes clear, laws like Amendment 73 that restrict the candidacy rights of incumbents without regard to political affiliation or viewpoint are neutral and nondiscriminatory.

Amendment 73 imposes only minor burdens on the rights of candidates and voters. In particular, its impact on candidates will fall on only a handful of individuals, and even as to them will entail only narrow restrictions on political opportunity. Moreover, there is no fundamental right of candidacy, so the Amendment's burden on candidates could not justify imposition of strict scrutiny under any circumstances.

The Amendment's impact on the rights of voters is even less significant, because it does not limit in any way the ability of voters to vote for whomever they choose or to associate together to place on the ballot a candidate reflecting their particular political views. While the Amendment does prevent voters from seeing the names of certain multi-term incumbents on the ballot, that limitation applies only to a tiny fraction of the potential candidates, and in any event there is no fundamental right to have any particular individual listed on the ballot. As this Court made clear in *Anderson v. Celebrezze*, the crucial consideration is whether a challenged election law precludes particular groups from placing *any* candidate on the ballot; Amendment 73 does not, and accordingly it should be subjected only to minimal scrutiny.

B. Amendment 73 directly serves the important, and indeed compelling, state interests in ensuring the fairness and integrity of elections and preserving openness and competition in the political marketplace. The present system of congressional elections is far less free and less competitive than it was intended to be, in large part because of the significant

advantages provided to multi-term congressional incumbents by virtue of their positions. Those advantages of congressional office bolster the electoral strength of multi-term incumbents in ways wholly unrelated to the appeal of their political views, and thus state action aimed at reducing those advantages fosters the core values of the First and Fourteenth Amendments by promoting competition, integrity, and openness.

Amendment 73 is a necessary response to the present imbalance in the electoral system. In a measured and reasonable way, it places a minor burden on the political opportunity of multi-term incumbents in order to counteract the government-provided benefits of long-term incumbency and thereby render congressional elections more fair and open and encourage political debate and involvement. The First and Fourteenth Amendments do not preclude the State of Arkansas from achieving those salutary results in this manner.

ARGUMENT

THE STATES ARE FREE TO EXCLUDE THE NAMES OF MULTI-TERM UNITED STATES SENATORS AND REPRESENTATIVES FROM ELECTION BALLOTS FOR THOSE OFFICES

Exercising the powers retained by them under the Arkansas Constitution (Ark. Const., amend. 7) and the Constitution of the United States (U.S. Const., art. I, § 4, cl. 1; *id.*, amend. IX and X), the people of the State of Arkansas have chosen to exclude the names of multi-term congressional incumbents from ballots for election to the offices previously held by those individuals. Ark. Const., amend. 73, § 3 (*reproduced at* Appendix to the Petition for a Writ of Certiorari in No. 93-1456 ("Pet. App."), at 69a). Nothing about that choice contravenes the requirements of the federal Constitution.

I. AMENDMENT 73 DOES NOT IMPLICATE THE QUALIFICATIONS CLAUSES BECAUSE IT DOES NOT IMPOSE AN ADDITIONAL QUALIFICATION FOR MEMBERSHIP IN THE UNITED STATES SENATE OR HOUSE OF REPRESENTATIVES

Relying on *Powell v. McCormack*, 395 U.S. 486 (1969), the Supreme Court of Arkansas struck down Amendment 73's congressional ballot-access restriction on the ground that it violates the Qualifications Clauses, U.S. Const., art. I, § 2, cl. 2, and art. I, § 3, cl. 3.[1] Pet. App. 11a-15a. According to the Arkansas court, the three qualifications for congressional office set forth in the Qualifications Clauses—age, years of citizenship, and residence within the State—were intended to be exclusive, and Amendment 73 impermissibly imposes "[a]n additional qualification," namely, lack of "prior service." Pet. App. 15a. The Supreme Court of Arkansas plainly erred in reaching that conclusion.

Powell v. McCormack involved a challenge to the authority of the House of Representatives to exclude by majority vote a Representative who had been elected by the voters of his district and who met all of the qualifications for office set forth in the Constitution. Examining the text and history of the Constitution, the Court concluded that the constitutional authority of each House of Congress to

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[1] The Qualifications Clause for the House of Representatives, U.S. Const., art. I, § 2, cl. 2, provides:

> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Similarly, the Qualifications Clause for the Senate, U.S. Const., art. I, § 3, cl. 3, provides:

> No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

"be the Judge of the . . . Qualifications of its own Members," U.S. Const. art. I, § 5, cl. 1, is "limited to the standing qualifications prescribed in the Constitution." 395 U.S. at 550. As a consequence, the Court held that "the House [of Representatives] is without power to exclude any member-elect who meets the Constitution's requirements for membership." *Id.* at 547.

The question presented in *Powell* concerned the power of a single House of Congress to impose additional qualifications in the exercise of its authority under art. I, § 5, cl. 1. Accordingly, the *Powell* Court limited its holding to that issue, and did not purport to decide the separate question whether a State (or its citizens) may impose additional qualifications for congressional membership under either art. I, § 4, cl. 1 of the Constitution or the powers retained by virtue of the Ninth and Tenth Amendments. *Cf. Buckley v. Valeo*, 424 U.S. 1, 133 (1976) (per curiam) (leaving open the question of Congress's power to impose additional membership qualifications). This case likewise presents no opportunity for this Court to resolve that question, because the language of Amendment 73 and the text, history, and consistent judicial interpretation of the Qualifications Clauses make clear that Amendment 73 does not impose an additional qualification for congressional membership.

A. Amendment 73 Does Not Impose A Legal Prerequisite To Eligibility for Membership In Congress

As definitively construed by the Supreme Court of Arkansas, Amendment 73 does not in any way narrow the class of persons legally eligible for membership in the United States Senate or House of Representatives. The Amendment merely limits access to the State's printed ballots for those offices: "[a]ny person" meeting the multi-term incumbency requirements "shall not be eligible to have his/her name placed on the ballot for election" to the relevant congressional office. Ark. Const., amend. 73, § 3(a) and (b); Pet. App. 69a.

Under Arkansas law, the fact that an individual's name cannot be printed on the ballot does not disqualify that individual from membership in Congress. To the contrary, the Supreme Court of Arkansas expressly "recognize[d] that an ineligible congressman under Amendment 73 is not totally disqualified and might run as a write-in candidate for Congress or receive a gubernatorial appointment to fill a vacancy in the same body." Pet. App. 15a; *see id.* at 27a (Dudley, J., concurring in part and dissenting in part); *id.* at 37a (Cracraft, Spec. C.J., concurring in part; dissenting in part). That interpretation of Amendment 73 is binding on this Court (*see, e.g., International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986)), and it conclusively demonstrates that the Amendment does not impose an additional "qualification" for congressional office because it does not limit in any way the class of persons eligible for membership in Congress.

To be sure, the exclusion of long-term incumbents from election ballots will undoubtedly make it more difficult for those individuals to win reelection, and may well result in electoral defeat for many incumbents who seek reelection as write-in candidates. For that reason, the Supreme Court of Arkansas concluded that Amendment 73 imposes an additional qualification for congressional office. *See* Pet. App. 15a (reasoning that Amendment 73 imposes an additional qualification because it provides only "glimmers of opportunity for those disqualified" from access to the ballot); *id.* at 27a (Dudley, J., concurring in part and dissenting in part) (Amendment 73 imposes a qualification because "write-in candidates are at a distinct disadvantage").

That conclusion must be rejected because it rests on a fundamental misunderstanding of the nature of a qualification for congressional office. As demonstrated below, laws that merely restrict access to the ballot without rendering anyone ineligible for office simply do not constitute "[q]ualifications" within the meaning of the Constitution.

B. The Term "Qualifications" Encompasses Only Those Attributes Without Which An Individual Is Ineligible As A Matter Of Law For Membership In Congress

Properly understood, "[q]ualifications" are those attributes that are necessary to render an individual legally eligible to become a Member of Congress and without which the individual is, as a matter of law, absolutely disqualified from membership. A mere restriction on access to the ballot, therefore, cannot constitute a qualification for congressional office, because it does not render any person ineligible for office as a matter of law.

This Court held precisely that in *Storer v. Brown*, 415 U.S. 724 (1974). In that case, independent congressional candidates challenged the constitutionality of a California statute that barred them from access to the ballot because they had been affiliated with a political party within one year prior to the immediately preceding primary. *Id.* at 726-27. The candidates argued, *inter alia*, that California's refusal to include their names on the ballot added an additional qualification for congressional office in violation of the Qualifications Clause applicable to the House of Representatives, U.S. Const., art. I, § 2, cl. 2. *See* 415 U.S. at 727.

This Court squarely rejected the candidates' argument, explaining:

> The argument is wholly without merit. *[Appellants] would not have been disqualified had they been* nominated at a party primary or by an adequately supported independent petition and then *elected at the general election*. The [challenged] requirement no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support.

415 U.S. at 746 n.16 (emphasis added).

Storer compels rejection of the conclusion below that Amendment 73 amounts to an additional qualification for office merely because it excludes certain candidates from the ballot. Just as in *Storer*, any Arkansas congressional candidate who is subject to the ballot-access restrictions contained in Amendment 73 "would not . . . be disqualified" from membership in the House or Senate if he or she chooses to run and is "then elected at the general election." 415 U.S. at 746 n.16. Thus, Amendment 73 "no more establishes an additional requirement for the office of Representative" or Senator than does any other ballot-access restriction. *Id.* Under *Storer*, a mere restriction on access to the ballot—even one that "serve[s] as an absolute bar to ballot access," *Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986)—is not an additional qualification for congressional membership if it does not preclude a candidate who wins the general election from taking his or her seat in Congress.

In any event, even if *Storer* did not dispose of the Qualifications Clauses issue in this case, the decision below could not withstand scrutiny, because it is directly inconsistent with the text, history, and longstanding judicial construction of the Qualifications Clauses and related provisions. As those authorities conclusively demonstrate, laws like Amendment 73 that do not disqualify anyone from eligibility for membership in Congress but instead merely make it more difficult for a particular class of individuals to win elections do not impose "[q]ualifications" within the meaning of the Constitution. Accordingly, Amendment 73 does not violate the Qualifications Clauses.

1. The Text Of The Constitution Makes Clear That The Term "Qualifications" Encompasses Only Those Attributes Without Which An Individual Is Ineligible As A Matter Of Law For Membership In Congress

In ascertaining the meaning of the Constitution, "the plain language of the enacted text is the best indicator of intent." *Nixon v. United States*, 113 S. Ct. 732, 737 (1993).

In this case, the text of the relevant provisions reveals that a law barring individuals from access to the ballot but leaving them free to serve as Members of Congress does not constitute a qualification for congressional office within the meaning of the Constitution.

The Qualifications Clauses themselves speak exclusively in terms of legal disabilities to membership, and do not extend to mere burdens on the ability of some candidates to win election: "*No Person shall be* a [Representative or Senator] who shall not have attained to the [requisite] Age . . ., and been . . . a Citizen of the United States [for the requisite time period], and who shall not, when elected, be an Inhabitant of that State [in] which he shall be chosen." U.S. Const., art. I, § 2, cl. 2, and § 3, cl. 3 (emphasis added). Amendment 73, by contrast, does not provide that "[n]o person shall be a" Representative or Senator after having served the requisite number of terms in office; instead, it excludes such persons from the ballot but leaves them otherwise free to serve as Members of the House or Senate for as long as the voters choose to reelect them. The clear implication is that Amendment 73 does not impose an additional qualification for membership in Congress.

A related provision of the Constitution confirms the commonsense notion that a ballot-access restriction like Amendment 73 is not a qualification for congressional office. Art. I, § 5, cl. 1 makes each House "the Judge of the Elections, Returns and Qualifications of its own Members." Obviously, then, the term "[q]ualifications" must refer to those attributes that are capable of being judged by the House or Senate in determining whether to seat a prospective Member. Amendment 73 leaves nothing for the House or Senate to "[j]udge," however, because it does not disable any individual who wins election from taking office. Accordingly, the text of the Constitution compels rejection of the claim that Amendment 73 imposes an additional qualification for congressional membership.

2. The Drafting History And Contemporary Understanding Of The Qualifications Clauses Confirm That The Term "Qualifications" Encompasses Only Those Attributes Without Which An Individual Is Ineligible As A Matter Of Law For Membership In Congress

The Framers of the Constitution and their contemporaries plainly understood the term "[q]ualifications" as used in the Constitution to refer exclusively to those attributes of candidates that were absolute prerequisites to eligibility for office. The dictionary definition of "qualification" was then, as it is now, "[t]hat which makes any person or thing fit for any thing." 2 S. Johnson, *A Dictionary of the English Language* 1567 (4th ed. 1773); *see Webster's Third New Int'l Dictionary* 1858 (1976) ("qualification" means "an endowment or acquirement that fits a person (as for an office)" or "a condition precedent that must be complied with (as for the attainment of a privilege)").[2] Under that definition, of course, a law making it merely difficult, but not impermissible as a matter of law, for an individual to be elected to a particular office does not constitute a "qualification" because it does not render anyone "[un]fit" for office.

Not surprisingly, the available historical sources confirm that the Framers consistently used the term "qualifications" in this manner. James Madison, for example, asserted that the "qualifications" of elected officials were expressed in those laws "limiting the number [of persons] *capable of being elected*." 2 *The Records of the Federal Convention of 1787* 250 (M. Farrand ed. 1911) (hereinafter "Farrand") (emphasis added); *cf. id.* at 249-50 ("qualifications of electors" limit "the number [of persons] *authorised to elect*") (emphasis added).

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[2] *Accord* J. Bouvier, *A Law Dictionary* 408 (6th ed. 1856) (defining "[q]ualification" to mean "[h]aving the requisite qualities for a thing; as, to be president of the United States, the candidate must possess certain qualifications."); *see also* 2 S. Johnson, *supra*, at 1567 (defining "to qualify" as "[t]o fit for any thing" or "[t]o make capable of any employment or privilege: as, he is *qualified* to kill game").

Madison specifically characterized the Qualifications Clauses as setting forth "[t]he qualifications *of the elected*." *The Federalist* No. 52, at 354-55 (J. Madison) (J. Cooke ed. 1961) (emphasis added). Similarly, Alexander Hamilton took the position that the Qualifications Clauses define "[t]he qualifications of *the persons who may . . . be chosen*" for Congress. *The Federalist* No. 60, at 408-09 (A. Hamilton) (J. Cooke ed. 1961) (emphasis added). Amendment 73's exclusion of multi-term incumbents from the ballot is plainly not a "qualification[]" in the sense understood by Madison and Hamilton, because it does not remove those incumbents from the category of "persons who may . . . be chosen" or "elected."

This understanding of the meaning of the term "qualifications" was universal among legal thinkers of the era. William Blackstone, for example, who was the leading legal scholar known in this country at the time of the Constitutional Convention, used the word in precisely the same sense; his listing of the "qualifications" of members of the House of Commons consists of various attributes that members "must" or "must not" have and that render them "eligible" or "not eligible" to be members or "capable of being elected." 1 W. Blackstone, *Commentaries on the Laws of England* 169-70 (1st ed. 1765). Not one of the "qualifications" listed by Blackstone is a provision that merely makes it more difficult for a class of individuals to win elections; rather, each of those qualifications is an absolute legal prerequisite to an individual's eligibility to serve as a member of Parliament, and applies *regardless* of the outcome of the election.

To the same effect is Justice Story's treatise on the Constitution, which uses the term "qualifications" interchangeably with "prerequisites to office." 2 J. Story, *Commentaries on the Constitution of the United States* § 612, at 89 (1st ed. 1833). Indeed, in arguing that the Qualifications Clauses preclude imposition of additional qualifications for congressional office, Story makes clear his understanding that the Clauses would not be implicated by anything short of a legal

prerequisite to eligibility for membership in Congress: "when the constitution established certain qualifications, *as necessary for office*, it meant to exclude all others, *as prerequisites*." *Id.* § 624, at 100 (emphasis added). *See also* 2 *The Founders Constitution* 75 (P. Kurland & R. Lerner eds. 1987) (quoting Wilson Nicholas, a delegate to the Virginia ratifying convention, who characterized "the qualifications of the elected" as determining who "should be excluded from the right of being chosen to the legislature").There is simply no historical support for the notion that a law imposes an additional qualification for office if it merely renders electoral success more difficult for some persons without categorically barring them from taking office if chosen by the electorate. Indeed, both Madison and Hamilton expressed the opposite belief. At the Constitutional Convention, for example, Madison argued strenuously in favor of congressional authority to override state laws enacted under the Times, Places and Manner Clause, which authorizes the States to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const., art. I, § 4, cl. 1. Madison took this position precisely *because* he understood that, if Congress did not have that power, the States' undoubted authority to enact election laws favoring one class of candidates over another would be wholly unrestrained: "[M]any . . . points [of election procedure] would depend on the [State] Legislatures[,] and might *materially affect the appointments* [to the House of Representatives]. Whenever the State Legislatures had a favorite measure to carry, *they would take care so to mould their regulations as to favor the candidates they wished to succeed*." 2 Farrand 240-41 (emphases added). Madison's view prevailed, and Congress now possesses plenary authority under the Times, Places and Manner Clause.

If Madison had believed that state election laws favoring one class of candidates over another would constitute invalid attempts to impose additional qualifications for of-

fice, there would have been no reason for him to express concerns about such laws or to argue in favor of granting Congress the power to override them. Madison did express those concerns, however, because he understood that the Qualifications Clauses did not preclude the States from enacting election laws that would make it more difficult for certain candidates to win congressional elections.

Hamilton's views on this issue were the same. In *The Federalist* No. 60, he addressed the contention that the powers granted to Congress (and, therefore, to the States as well) by the Times, Places and Manner Clause "might be employed in such a manner as *to promote the election of some favourite class of men in exclusion of others*; by confining the places of election to particular districts, and rendering it impracticable to the citizens at large to partake in the choice." *The Federalist* No. 60, at 403-04 (A. Hamilton) (J. Cooke ed. 1961) (emphasis added). Rather than suggest that a law effectively precluding the election of certain candidates would amount to an unconstitutional additional qualification for congressional office, Hamilton offered an entirely differen response: he argued that such an assault on the people's libertie would be unlikely to succeed (*id.* at 404-08), and that even if the expedient suggested might be successful" it would l kely take a different form. *Id.* at 409-10.

Hamilton's failure to rely on the Qualifications Clauses in response to fears of congressional control over election outcomes cannot be dismissed as an oversight. In the very same discussion, he argued that Congress could not achieve an equivalent result "by prescribing qualifications of property . . . for those who may . . . be elected," because "[t]he qualifications of the persons who may . . . be chosen . . . are unalterable by the [Congress]." *Id.* at 408, 409. The only possible explanation for Hamilton's position is that he understood the term "[q]ualifications" as used in the Constitution to refer only to prerequisites to eligibility for office, and not to

laws that make it more difficult (or even impossible) as a practical matter for some individuals to win elections.[3]

As the foregoing authorities demonstrate, the Founders and their contemporaries understood the term "[q]ualifications" to refer exclusively to those attributes that constitute legal prerequisites to service in Congress. Wholly excluded from the category of "[q]ualifications" were those laws that merely made it more difficult for some candidates to win elections without rendering anyone ineligible as a matter of law to hold office. Given this uniform understanding of the constitutional text, there is no basis for concluding that Amendment 73 imposes an additional qualification for congressional membership.

3. Consistent Judicial Interpretation Of The Qualifications Clauses Further Demonstrates That The Term "Qualifications" Encompasses Only Those Attributes Without Which An Individual Is Ineligible As A Matter Of Law For Membership In Congress

In keeping with the text and historical understanding of the Qualifications Clauses, this Court has consistently used the term "[q]ualifications" to mean legal prerequisites to eligibility for membership in Congress. Thus, in *Powell v. McCormack*, the Court characterized qualifications as "requirements for membership" (395 U.S. at 522, 533, 547) that "limit[] whom the people can select." *Id.* at 547. *See also Nixon v. United States*, 113 S. Ct. at 740 (discussing

[3] Indeed, Hamilton believed that one *virtue* of the Times, Places and Manner Clause was that it authorized legislation to prevent any one political faction from maintaining permanent control of Congress. In particular, he argued that Congress's power under the Times, Places and Manner Clause to prescribe a uniform date for congressional elections would provide "a security against the perpetuation of the same spirit in [Congress]." *The Federalist* No. 61, at 413 (A. Hamilton) (J. Cooke ed. 1961). Amendment 73 is aimed at precisely the same result, so it is apparent that Hamilton would have seen no constitutional impediment to its enforcement.

which qualifications "might be imposed for House membership"); *Buckley v. Valeo*, 424 U.S. at 133 (discussing the question of Congress's power to impose "substantive qualifications on the right to . . . hold . . . office [as Senator or Representative]").

In *Storer v. Brown*, moreover, the Court referred to qualifications as "requirement[s] for . . . office," and squarely held that laws excluding particular individuals from access to the ballot but leaving them otherwise free to take office if elected do not constitute additional qualifications within the meaning of the Constitution. 415 U.S. at 746 n.16. *Storer* is directly inconsistent with the notion that laws merely making it more difficult to win elections constitute additional qualifications for office.

The lower federal and state courts have similarly concluded that the Qualifications Clauses are not implicated by state laws that do not render candidates legally ineligible for membership in Congress. In *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1984), *vacated in other part on other grounds*, 471 U.S. 459 (1985), for example, the First Circuit rejected the claim that a provision barring certain candidates from access to the general election ballot for United States Senator constituted an additional qualification for office. The court explained: "the test to determine whether or not the 'restriction' amounts to a 'qualification' within the meaning of Article I, Section 3, is whether the candidate 'could be elected if his name were written in by a sufficient number of electors.'" 746 F.2d at 103 (quoting *State ex rel. Johnson v. Crane*, 197 P.2d 864, 871 (Wyo. 1948)). Under that test, of course, Amendment 73 does not impose a qualification for membership in Congress, because it does not preclude any incumbent from being elected and taking office if his or her "name [is] written in by a sufficient number of electors."

Numerous other cases are to the same effect. *See, e.g.*, *Joyner v. Mofford*, 706 F.2d 1523, 1531 (9th Cir.) (state

resign-to-run law "does not impose a fourth qualification on candidates for Congress because it does not prevent an elected state officeholder [who resigns or is removed from state office] from running for federal office"), *cert. denied*, 464 U.S. 1002 (1983); *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 832 (N.D. Ga.) (quoting *Hopfmann v. Connolly*, *supra*), *aff'd*, 992 F.2d 1548 (11th Cir. 1993); *Williams v. Tucker*, 382 F. Supp. 381, 388 (M.D. Pa. 1974); *State ex rel. O'Sullivan v. Swanson*, 257 N.W. 255, 255-56 (Neb. 1934) (rejecting senatorial candidate's challenge to state statute excluding him from general election ballot, because "[t]he question is not whether he may be a candidate, but whether he may be nominated by petition and have his name printed on the ballot at the state's expense. He may be a candidate and if electors write his name on the ballot in sufficient numbers he will be elected. . . . The state statute in no manner seeks to add other qualifications. It does not prevent him from being a candidate."); *see also Shub v. Simpson*, 76 A.2d 332 (Md.), *appeal dismissed as moot*, 340 U.S. 881 (1950) (discussing *State ex rel. O'Sullivan v. Swanson*, *supra*, with approval); *State ex rel. Johnson v. Crane*, 197 P.2d at 870-71 (same); *State ex rel. Sundfor v. Thorson*, 6 N.W.2d 89, 91-92 (N.D. 1942) (same). These authorities confirm the longstanding judicial understanding that the category of "[q]ualifications" is limited to legal prerequisites for office.

The foregoing authorities demonstrate conclusively that Amendment 73 does not impose an additional qualification for membership in Congress. The Supreme Court of Arkansas's conclusion to the contrary is simply impossible to reconcile with the text, history, and longstanding judicial interpretation of the Qualifications Clauses.

C. The Analysis Of The Court Below Must Be Rejected, Because It Offers No Judicially Manageable Standards For Determining The Validity Of Election Laws And Improperly Intrudes On The Authority Of Congress

The Supreme Court of Arkansas reasoned that Amendment 73 constitutes a qualification for congressional office because it makes election to such office more difficult—but not legally impermissible—for a particular class of individuals. *See* Pet. App. 15a; *id.* at 27a (Dudley, J., concurring in part and dissenting in part); *id.* at 41a (G. Brown, Spec. J., concurring in part; dissenting in part). That reasoning should be rejected by this Court, because it provides no judicially manageable standards for determining whether a regulation of the electoral process is unconstitutional. Moreover, because the Constitution expressly allocates to Congress the ultimate authority to regulate the manner by which congressional elections are to be conducted, it would be inappropriate for the judiciary to usurp that role in the manner suggested by the court below.

The various opinions of the majority of the Arkansas Supreme Court offer no meaningful standard for deciding whether an election law imposes an additional qualification for congressional office. Instead, any law that leaves only "glimmers of opportunity" for a particular class of candidates (Pet. App. 15a) or that places some candidates "at a distinct disadvantage" (*id.* at 27a (Dudley, J., concurring in part and dissenting in part) would apparently be invalidated under the analysis applied below.

Courts are ill-equipped to judge the validity of legislative enactments based on such a vague and content-less standard. Virtually every ballot-access restriction, for example, excludes some candidates from the ballot and leaves them with, at best, mere "glimmers of opportunity" for electoral success.[4] Under the approach developed by the court below, all

[4] Indeed, the candidates who were excluded from the ballot in *Storer v. Brown* were in precisely the same situation as are the multi-term

[Footnote continued on following page]

such laws must be invalidated, unless the courts are to be given wholly unrestrained discretion to pick and choose those ballot-access provisions that comport with judicial views of wise policy.

More generally, if this Court were to strike down Amendment 73 on the ground that it imposes an impermissible additional qualification for congressional office, there would be no principled basis on which to uphold a wide array of election regulations and related provisions adopted by state legislatures and Congress. State resign-to-run laws (*see, e.g., Clements v. Fashing*, 457 U.S. 957 (1982)), the federal Hatch Act (*see, e.g., United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973)), and countless other provisions of state and federal law (*see, e.g., Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)) impose direct and substantial burdens on the ability of large classes of individuals to obtain congressional office. Those provisions unquestionably place the affected individuals "at a distinct disadvantage" if they wish to run for Congress and, as a practical matter, may well eliminate even the slightest "glimmers of opportunity" for those individuals.

Similarly, it is well recognized that challengers face almost insurmountable odds in seeking to unseat multi-term congressional incumbents, in large part because of various laws enacted by Congress that provide considerable political benefits to those incumbents. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 31 n.33 (1976); J. Levy, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 Geo. L.J. 1913, 1916 (1992). Congressional

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incumbents who will be affected by Amendment 73. Any interpretation of the Qualifications Clauses that invalidates Amendment 73 must necessarily have the same effect on the California statute at issue in *Storer* and on all equivalent statutes.

legislation providing these benefits to multi-term incumbents unquestionably places challengers at "a distinct disadvantage," and indeed makes electoral success all but impossible in many cases.

The constitutionality of such legislation has never been open to serious question, but a ruling that Amendment 73 constitutes an impermissible additional qualification would necessarily result in invalidation of those laws as well, because they too place heavy burdens on the ability of some candidates to win elections against multi-term incumbents. If the category of congressional "[q]ualifications" is extended to include laws like Amendment 73 that affect the electoral prospects of specific individuals without denying them eligibility for office, there will no basis for upholding any such legislation. After all, Amendment 73 merely attempts to level the playing field for candidates challenging multi-term incumbents; if the Constitution can be interpreted to forbid such laws, *a fortiori* it must also forbid the laws that help maintain the present unbalanced electoral system.

The impropriety of injecting the courts so deeply into the regulation of congressional elections is patently obvious. As this Court has recognized, "'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.'" *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. at 730). No such "substantial regulation" of congressional elections will be possible, however, if the Qualifications Clauses are to be interpreted to preclude Congress and the States from adopting ballot-access restrictions, campaign finance laws, and the myriad of other election laws that directly or indirectly affect the ability of particular individuals to win congressional elections.

Moreover, the Constitution expressly identifies Congress, not the courts, as the repository of ultimate federal authority to override unwise or harmful state election laws. The

Times, Places and Manner Clause authorizes the States, in the first instance, to regulate the conduct of congressional elections, but provides that "the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const., art. I, § 4, cl. 1. This textual commitment of authority to Congress counsels strongly against judicial intervention in this area, at least in the absence of equally explicit provisions—such as the First and Fourteenth Amendments, *see infra* part II—that provide judicially identifiable and manageable standards to be applied by the courts in judging the validity of election laws.

The approach followed by the court below provides no such standards, and would necessarily lead to undue judicial intrusion into political and policy matters entrusted by the Constitution to Congress. Accordingly, this Court should reject the analysis of the Supreme Court of Arkansas and hold that Amendment 73 does not violate the Qualifications Clauses.[5]

II. AMENDMENT 73 DOES NOT VIOLATE THE FIRST OR FOURTEENTH AMENDMENT RIGHTS OF ARKANSAS VOTERS OR CONGRESSIONAL CANDIDATES, BECAUSE IT IMPOSES A REASONABLE AND POLITICALLY NEUTRAL BALLOT ACCESS RESTRICTION DESIGNED TO ENHANCE THE FAIRNESS AND OPENNESS OF THE POLITICAL PROCESS

The provision of Amendment 73 at issue in this case bars a small class of individuals from access to the general election ballots for certain offices. It is well established that laws restricting access to the ballot will sometimes "place

[5] Even if Amendment 73 did impose an additional qualification for membership in Congress, it would not violate the Constitution. As explained in the brief of petitioner the State of Arkansas, the people of the various States retain the power to limit the class of persons from whom they will select their representatives, and Amendment 73 is an appropriate exercise of that power. For the reasons set forth in text, however, it is unnecessary to reach that question in this case.

burdens on two different, although overlapping, kinds of rights [under the First and Fourteenth Amendments]—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *see, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).

As this Court has repeatedly cautioned, however, "the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.'" *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992) (omissions in original) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)); *see Anderson v. Celebrezze*, 460 U.S. at 788. Rather, because "'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest,'" *id.* (quoting *Storer v. Brown*, 415 U.S. at 730), the validity of such regulations has been judged by "a more flexible standard." *Burdick v. Takushi*, 112 S. Ct. at 2063.

Therefore, a reviewing court must "weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* at 2063 (quoting *Anderson v. Celebrezze*, 460 U.S. at 789). The rigorousness of a court's scrutiny of a ballot-access restriction will depend on the nature and extent of the burdens imposed on First and Fourteenth Amendment rights: "when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance,'" but "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amend-

ment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick v. Takushi*, 112 S. Ct. at 2063-64 (quoting *Anderson v. Celebrezze*, 460 U.S. at 788).

The ballot-access restrictions at issue in this case readily pass constitutional muster under the Court's standard.[6] Amendment 73 does not discriminate against indigent or independent candidates as a class, nor does it impinge on the ability of minor parties to obtain access to the ballot. The Amendment's direct effect falls on candidates, not voters, and it burdens the opportunity to seek elective office in only a limited and politically neutral manner. The Amendment's indirect impact on voters is even more insignificant, because it does not in any way limit their ability to vote for whomever they choose or to associate with like-minded individuals for the advancement of their common political beliefs. Accordingly, Amendment 73 cannot be deemed to violate the rights of Arkansas congressional candidates or voters.

A. Amendment 73 Should Be Subjected To Minimal Scrutiny, Because It Imposes Only Minor, Nondiscriminatory Burdens On First And Fourteenth Amendment Rights

1. Amendment 73 Is Politically Neutral And Non-discriminatory

In determining whether "'the character and magnitude of'" the burdens imposed by a particular ballot-access restriction are sufficiently severe as to require strict judicial scrutiny, this Court has focused primarily on the extent to which the challenged provision discriminates against the political rights

[6] The court below did not address the question whether Amendment 73's ballot-access restrictions on congressional incumbents violate the First and Fourteenth Amendments. The court rejected an analogous challenge to the more severe restrictions imposed on state elected officials, however (*see* Pet. App. 19a-22a), so there is no reason to remand this case in order to permit that court to consider the same issue with respect to the less burdensome regulation of congressional incumbents.

of minor parties, independent candidates, or the indigent. In cases where the election law at issue does not unfairly restrict opportunity for disadvantaged political groups, the Court has routinely upheld the challenged law; in cases involving discrimination against such groups, however, the Court has not hesitated to strike down the offending regulation.

For example, in *Williams v. Rhodes*, 393 U.S. 23, 31 (1968), the Court concluded that the challenged laws gave the two major parties "a decided advantage over any new parties struggling for existence and thus place[d] substantially unequal burdens on both the right to vote and the right to associate." As a result, strict scrutiny was warranted "[i]n determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake." *Id.*; *see Norman v. Reed*, 112 S. Ct. 698, 705 (1992) (state laws severely "limiting the access *of new parties* to the ballot" are subject to strict scrutiny) (emphasis added); *Anderson v. Celebrezze*, 460 U.S. at 787, 793-94 & n.16, 804 (invalidating ballot-access measure that "does discriminate against independents").

Similarly, in *Bullock v. Carter*, 405 U.S. 134 (1972), the Court held that strict scrutiny was appropriate because the candidate-filing-fee requirement at issue in that case had a "patently exclusionary" effect that fell "with unequal weight on voters, as well as candidates, according to their economic status." *Id.* at 143, 144; *see also Lubin v. Panish*, 415 U.S. 709, 716 (1974) ("the process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars"). These cases demonstrate that the Court will closely scrutinize those laws that unfairly burden disadvantaged political groups, because "the primary values protected by the First Amendment—'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'—are served when election campaigns are not monopolized by the existing political parties." *Anderson v. Celebrezze*, 460 U.S. at 794 (footnote and citations omitted); *see Clements v.*

Fashing, 457 U.S. 957, 964-65 (1982) (opinion of Rehnquist, J.); *see also* L. Tribe, *American Constitutional Law* § 13-18, at 1097 (2d ed. 1988) ("the vigor of judicial review of election laws has been roughly proportioned to their potential for immunizing the current leadership from successful attack").

On the other hand, the Court has generally upheld those regulations that do not place unequal burdens on politically disadvantaged groups. For example, in *Storer v. Brown*, 415 U.S. at 733, the Court emphasized that the challenged ballot-access measure "involves no discrimination against independents." Similarly, in *American Party of Texas v. White*, 415 U.S. 767, 787-88 (1974), the Court rejected a challenge to a ballot-access law that "'in no way freezes the status quo'" and "affords minority political parties a real and essentially equal opportunity for ballot qualification." *See also Jenness v. Fortson*, 403 U.S. 431, 438, 442 (1971) (upholding election laws that "do not operate to freeze the political status quo" and "ha[ve] insulated not a single potential voter from the appeal of new political voices"); *cf. Burdick v. Takushi*, 112 S. Ct. at 2066 (write-in ban "politically neutral" because "there is nothing content based about a flat ban on all forms of write-in ballots.").

Amendment 73, of course, does not discriminate against minor parties, independent or economically disadvantaged candidates, or their supporters. To the contrary, Amendment 73 burdens only multi-term incumbents, a uniquely privileged class of individuals who have long enjoyed the "significant [political] advantages" of congressional office. *Buckley v. Valeo*, 424 U.S. at 31 n.33; *see also* J. Levy, *supra*, 80 Geo. L.J. at 1916.[7] Moreover, Amendment 73 applies equally

[7] The fact that discrimination against disadvantaged political groups generally invokes heightened judicial scrutiny does not support application of the same level of scrutiny to laws that, like Amendment 73, differentiate between advantaged and disadvantaged political groups

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to all multi-term congressional incumbents, regardless of their political affiliations or viewpoints.

That Amendment 73's burden on long-sitting Senators and Representatives is politically neutral and nondiscriminatory is made clear by this Court's decision in *Clements v. Fashing*, 457 U.S. 957 (1982). That case involved challenges to Texas constitutional provisions barring all state and federal officeholders from membership in the state legislature during their terms of office and requiring certain state officers to resign their positions before running for other elective office. The plurality opinion concluded that limitations on the candidacy rights of officeholders "do not contain any classification that imposes special burdens on minority political parties or independent candidates," do not "depend upon political affiliation or political viewpoint," and do not "burden[] access to the political process by those who are outside the 'mainstream' of political life." 457 U.S. at 965, 967 (opinion of Rehnquist, J.); *see also id.* at 972-73 (opinion of Court) (indicating that challenged classifications were not "invidious"); *id.* at 974 n.1 (Stevens, J., concurring in part and concurring in the judgment) ("The fact that appellees hold state office is sufficient to justify a restriction on their ability to run for other office that is not imposed on the public generally."). Thus, Amendment 73, which equally burdens all multi-term incumbents, is politically neutral and nondiscriminatory.

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by burdening only the *former* and by providing *greater* access and opportunity for the latter. Unlike laws based on racial classifications, which are always subject to strict scrutiny (even when they burden a racial majority) because of the invidious nature of such distinctions (*see, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)), there is nothing invidious about discriminating against multi-term incumbents, a class defined not by "an immutable characteristic determined solely by the accident of birth" (*Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)), but rather by its entrenchment in office due to unmatched access to political power and government-conferred benefits.

2. Amendment 73 Imposes Only Minor Burdens On The Rights Of Candidates And Voters

Amendment 73 directly burdens only the opportunity of multi-term congressional incumbents to have their names listed on election ballots for the congressional offices previously held by them. Thus, the impact of the Amendment will be felt by, at most, only a handful of candidates, and even as to them it will apply only to the one congressional office (or, conceivably, the two offices) already occupied by those individuals for a substantial period of time. Long-term congressional incumbents remain wholly free to run for all other elective offices under precisely the same terms as every other candidate, and they are even permitted to run for reelection to the congressional office they previously held. In short, the restrictions imposed by Amendment 73 are *de minimis* as to both the number of candidates affected and the extent of the burden placed on those few individuals.[8]

Moreover, there is no fundamental right of candidacy (*see Clements v. Fashing*, 457 U.S. at 963 (opinion of Rehnquist, J.); *id.* at 977 n.2 (Brennan, J., dissenting); *Bullock v. Carter*, 405 U.S. at 142-143), and multi-term congressional incumbents are not a suspect class or an "identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson v. Celebrezze*, 460 U.S. at 793; *see supra* note 7. Accordingly, any burden imposed by Amendment 73 on incumbents who wish to seek reelection to their congressional offices would not in itself justify heightened judicial scrutiny under any circumstances.

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[8] In addition, because Amendment 73 has not yet barred any Representative or Senator from the ballot, there is no basis on which to conclude that it will prevent multi-term incumbents from maintaining their seats once they become subject to its provisions. The opponents of Amendment 73 bear the burden of demonstrating that the burden it imposes is unduly severe (*see American Party of Tex.*, 415 U.S. at 790; *Storer*, 415 U.S. at 740; *Mandel v. Bradley*, 432 U.S. 173, 178 (1977) (per curiam)), and they cannot meet that burden in the absence of any actual experience with elections conducted under the Amendment.

Of course, "'laws that affect candidates always have at least some theoretical, correlative effect on voters,'" *Anderson v. Celebrezze*, 460 U.S. at 786 (quoting *Bullock v. Carter*, 405 U.S. at 143), and thus it is necessary to consider as well the indirect impact of Amendment 73 on the rights of Arkansas voters. This Court's cases make clear, however, that the Amendment's effect (if any) on voting and associational rights falls far short of the type of burden required to justify invocation of strict scrutiny.

Amendment 73 does not in any manner limit the ability of Arkansas voters to vote for whomever they please in any election for local, state, or federal office. Nor does it impose an unequal burden on the ability of any particular political group to place on the ballot a candidate who supports the political views advocated by the members of the group. The *only* burden imposed on voters by Amendment 73, then, is that it may require supporters of a few individual candidates to cast write-in votes for those candidates rather than see their names printed on the ballot.[9] Because the Amendment will reduce only slightly (if at all) the number of individuals eligible for inclusion on the ballot,[10] it cannot be

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[9] Whatever the relevance of the write-in option in cases involving ballot-access restrictions on minor parties and independent candidates (*compare, e.g., Storer v. Brown*, 415 U.S. at 736 n.7 (relying on availability of write-in option as additional basis for upholding ballot-access restriction); *Jenness v. Fortson*, 403 U.S. at 438 (same); *with Anderson v. Celebrezze*, 460 U.S. at 799 n.26 (write-in option an "[in]adequate substitute" for having independent's name on ballot); *Lubin v. Panish*, 415 U.S. at 719 n.5 (dictum)), that option is likely to be of real significance for multi-term incumbents, who (unlike the typical independent or minor-party candidate) will virtually always enjoy widespread name recognition and well-developed fundraising capabilities.

[10] Arkansas is entitled to elect two United States Senators and four Representatives. Even if each of those seats were consistently occupied by incumbents for the full number of terms established by Amendment 73, an average of only five individuals (one Senator and four Repre-

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deemed to impose so severe a burden on voters that strict scrutiny is warranted. *Cf. Bullock v. Carter*, 405 U.S. at 144 (imposing strict scrutiny where voters were "*substantially limited* in their choice of candidates" and the limitation "f[e]ll more heavily on the less affluent segment of the community") (emphasis added).

Amendment 73's impact on the rights of voters must also be deemed minimal because there is no fundamental right to have the particular candidate of one's choice listed on the ballot. *See Lubin v. Panish*, 415 U.S. at 716 (rejecting notion that "every voter can be assured that a candidate to his liking will be on the ballot").[11] Provisions that, like Amendment 73, merely exclude from the ballot a particular class of individuals defined in a non-invidious manner do not require heightened judicial scrutiny because they do not implicate the core concerns of the First and Fourteenth Amendments.

Anderson v. Celebrezze demonstrates this point clearly. In that case, the Court observed that, "although candidate eligibility requirements may exclude particular candidates, it remains possible that an eligible candidate will 'adequately reflect the perspective of those who might have voted for a candidate who has been excluded.' But courts quite prop-

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sentatives) would become disqualified from access to the ballot every six years. This Court's cases provide no support for the notion that a law disqualifying (on a politically neutral basis) less than one person per year from access to the ballot imposes a "severe" restriction on the rights of voters.

[11] Indeed, there is not even a fundamental right to *vote* for the particular individual of one's choice. *See Burdick v. Takushi*, 112 S. Ct. at 2065-66 (rejecting claim that voter is entitled to cast "a 'protest vote' for Donald Duck," and concluding that an absolute "ban on write-in voting imposes only a limited burden on voters' rights"). Of course, the burden imposed on the rights of voters by Amendment 73 is far less severe than that at issue in *Burdick*, because Arkansas voters remain free to cast write-in votes even for multi-term congressional incumbents if they so choose.

erly 'have more carefully appraised the fairness and openness of laws that determine which political groups can place *any* candidate of their choice on the ballot.'" 460 U.S. at 793 n.15 (citations omitted); *see also id.* at 792 n.12 (distinguishing *Storer v. Brown*, which upheld a state law barring certain candidates from access to the ballot, because "[a]lthough [the provision at issue in *Storer*] may preclude such voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy the State's [ballot-access] requirements").

Amendment 73 does not "'determine which political groups can place *any* candidate of their choice on the ballot.'" It merely disqualifies a small number of individuals from the ballot, and leaves all political groups and parties equally free to place on the ballot any other candidates who reflect their views. Accordingly, the minor burdens it imposes on the rights of voters do not justify heightened judicial scrutiny.

B. The Important State Interests Served By Amendment 73 Are Plainly Sufficient To Justify Its Minimal Burden On Protected Rights

Amendment 73 serves a number of important state interests, any one of which is more than sufficient to justify its minimal intrusion on the rights of candidates and voters. In particular, the Amendment is precisely calculated to further the legitimate, and indeed compelling, state interests in ensuring the fairness and integrity of elections and preserving openness and competition in the political marketplace. *See, e.g.*, *Burdick v. Takushi*, 112 S. Ct. at 2063 ("'there must be a substantial regulation of elections if they are to be fair and honest'"); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990); *Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process. Toward that end, a State may enact laws . . . when necessary to ensure that elections are fair and honest.") (citation omitted); *Anderson v. Celebrezze*,

460 U.S. at 794; *Oregon v. Mitchell*, 400 U.S. 112, 288 (1970) (opinion of Stewart, J.) ("The States . . . are free to pass such laws as are necessary to assure fair elections."); *Williams v. Rhodes*, 393 U.S. at 32 ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.").

As the people of the State of Arkansas have found, "[e]ntrenched incumbency has . . . led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers." Pet. App. 68a.[12] The astonishingly high rate of reelection for congressional incumbents, particularly in the House of Representatives, is well documented,[13] and there is little doubt that the explanation for that political longevity can be found in the benefits provided to multi-term incumbents by virtue of their government positions.

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[12] The Founders certainly did not anticipate that the reelection rate for Members of the House of Representatives would routinely approach or exceed 90 percent. *See infra* note 13. Madison believed that only "[a] few of the members" would be reelected repeatedly, and that "[t]he election of the representatives by the people would not be governed by the same principle" as had been applicable under the Articles of Confederation, where the reelection of each State's congressional delegates was "considered by the legislative assemblies almost as a matter of course." *The Federalist* No. 53, at 364-65 (J. Madison) (J. Cooke ed. 1961). *See also id.* No. 37, at 234 (J. Madison) ("A frequent change of men will result from a frequent return of electors, and a frequent change of measures, from a frequent change of men"); *id.* No. 61, at 413 (A. Hamilton) (arguing that a uniform election date for the House would serve as a "security against the perpetuation of the same spirit in the body").

[13] *See, e.g.*, J. Levy, *supra*, 80 Geo. L.J. at 1916-17 (House reelection rates were 96% in 1990, 98% in 1988, 98% in 1986); Note, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 Tex. L. Rev. 865, 866 n.7 (1993) (88% in 1992); N. Gorsuch & M. Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 Hofstra L. Rev. 341, 384 (1991) (table demonstrating dramatic decline in House turnover rates from 1790 to 1988).

This Court recognized in *Buckley v. Valeo* that the "significant advantages" of incumbency include "voter recognition," "the status accruing to holding federal office," "access to substantial resources provided by the Government," and other well-known and substantial benefits. 424 U.S. at 31 n.33. Multi-term incumbents also enjoy overwhelming advantages in fundraising and access to the media. *See, e.g.* J. Levy, *supra*, 80 Geo. L.J. at 1916. Many of these advantages are conferred directly by the government, and all of them are at least indirectly attributable to the fact that multi-term incumbents enjoy positions of public trust and influence.

This overwhelming array of government-conferred political advantages bolsters the electoral strength of multi-term incumbents in ways wholly unrelated to the appeal of their political views. *Cf. Austin v. Michigan Chamber of Commerce*, 494 U.S. at 660. State action aimed at reducing these unfair advantages is plainly consistent with the legitimate government interests in promoting the fairness, integrity, openness, and competitiveness of elections; indeed, there is considerable force to the argument that the *failure* to take such steps poses a greater threat to First and Fourteenth Amendment values, because it ignores the reality that challengers are simply not in the same position as multi-term incumbents who have long enjoyed the special political advantages of congressional office. *See Anderson v. Celebrezze*, 460 U.S. at 801 ("'[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike'").

Thus, Amendment 73 is a necessary response to the present imbalance in the electoral system, an imbalance caused in large part by congressional legislation and other factors that are beyond the power of individual States to eliminate. To be sure, the voters of Arkansas have always possessed the power to vote individual multi-term incumbents out of office, but Amendment 73 provides a more complete and permanent solution to the systemic problem of entrenched incumbency. Just as the citizens of this Nation chose to

adopt the First Amendment and other provisions of the Bill of Rights in order to restrain the potential tyranny of future political majorities, so the people of the State of Arkansas have adopted a self-limiting measure that ensures that future electoral majorities will not be unduly swayed by the powerful political advantages enjoyed by multi-term incumbents.

Amendment 73 imposes a narrow, reasonable, and measured burden on the political opportunity of a few individuals and thereby levels the political playing field for all voters and candidates. Because the effect of the Amendment is to eliminate the special advantages of long-term incumbency, it will necessarily render congressional elections more fair and open, thereby encouraging political debate and involvement by new candidates, voters, and political parties—a result that is consistent with, and serves to foster, "the primary values protected by the First Amendment." *Anderson v. Celebrezze*, 460 U.S. at 794. In short, Amendment 73 directly furthers the legitimate governmental interests in the fairness, integrity, and openness of congressional elections without discriminating against any political viewpoint or politically disadvantaged group, and accordingly it should be upheld. *See Burdick v. Takushi*, 112 S. Ct. at 2066 ("[W]e have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls.").[14]

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[14] Indeed, this Court has already held, albeit summarily, that state laws analogous to Amendment 73 do not raise significant constitutional concerns. In *State ex rel. Maloney v. McCartney*, 223 S.E.2d 607 (W. Va.), *appeal dismissed for want of subst'l fed'l question*, 425 U.S. 946 (1976), the Supreme Court of Appeals of West Virginia rejected an incumbent governor's federal constitutional challenge to a state constitutional provision rendering him ineligible for reelection during the four years following his second term in office. The governor appealed to this Court, presenting for review the questions whether the state constitutional provision "deprives West Virginia voters of equal protection of the law in violation of the Fourteenth Amend-

[Footnote continued on following page]

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted.

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[Footnote continued from previous page]

ment" and "deprives a Governor who desires to seek a third consecutive term of freedom of expression and association in violation of the First and Fourteenth Amendments." J.S. in *Moore v. McCartney*, No. 75-1493, at 3. Finding those federal constitutional questions too inconsequential to merit plenary review, this Court dismissed for want of a substantial federal question. 425 U.S. 946. This decision is, of course, "entitled to precedential weight," *Meek v. Pittenger*, 421 U.S. 349, 367 n.16 (1975), and provides strong support for the conclusion that Amendment 73 does not violate the First and Fourteenth Amendments. *Accord, e.g., Legislature v. Eu*, 54 Cal. 3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309 (1991), *cert. denied*, 112 S. Ct. 1292 (1992); *Maddox v. Fortson*, 172 S.E.2d 595 (Ga.), *cert. denied*, 397 U.S. 149 (1970).